



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Atlas Headwear, Inc.

File: B-231488.2

Date: September 14, 1988

---

### DIGEST

1. Protest of agency failure to set aside entire acquisition for small business participation is denied where a large business on an established planning list under the Industrial Readiness Planning Program has indicated a desire to supply some or all of the required items by submitting an offer under a recent solicitation.
2. Protest of agency failure to set aside a portion of an acquisition for small business participation is sustained because agency's rationale that the requirement is not severable into two or more economic production quantities is not supportable where the solicitation itself provides that the acquisition may be divided into three lots for purposes of making multiple awards.

---

### DECISION

Atlas Headwear, Inc. protests the Defense Personnel Support Center's (DPSC) failure to set aside for small business participation request for proposals (RFP) No. DLA100-88-R-0370 for camouflage combat caps. Atlas contends that the acquisition should have been totally, or at least partially, set aside for small business. While we agree with DPSC concerning the total set-aside of this acquisition, the agency has not, in our view, provided a rational explanation as to why the acquisition was not issued as a partial set-aside. We sustain the protest on this basis.

The RFP provides for the award of up to three<sup>1/</sup> indefinite quantity/indefinite delivery contracts for a total maximum quantity of 1,900,000 caps. Delivery orders for 950,000

---

<sup>1/</sup> Less than three awards will be made if less than three reasonably priced acceptable offers are received.

043237

caps are to be issued at the time of award. If, in fact, three awards are made, an initial order for 316,666 caps will be placed with each contractor; if only two awards are made, two orders for 475,000 each will be placed; if only one award is made, one order for 950,000 will be placed. If additional quantities are needed, orders will be placed for up to another 950,000 caps with the contractor whose performance on the initial order quantities, evaluated on the basis of price, quality of product, and timeliness of delivery, proves most satisfactory.

The RFP was issued on an unrestricted basis. The agency determined that a total set-aside was barred by Federal Acquisition Regulation (FAR) § 19.502-5, which provides in relevant part that:

" . . . [A] total set-aside shall not be made when [an established planning list under the Industrial Readiness Planning Program<sup>2/</sup>] contains a large business Planned Emergency Producer of the item(s) who has conveyed a desire to supply some or all of the required items."

The agency explains that the cap is a planned item for industrial readiness and that the Planned Producer's list contains a large business, International Hat Company, which has conveyed a desire to supply some or all of the required items by submitting an offer under a recent solicitation for the caps, RFP No. DLA100-87-R-0761 (RFP 0761).

Atlas contends that International Hat's submission of an offer under RFP 0761 should not have been considered in determining whether to set aside RFP 0370 since the latter solicitation was merely a resolicitation of the same requirement. According to the protester, any justification for not setting aside the current RFP should have existed

---

<sup>2/</sup> The Industrial Readiness Program encompasses planning by the Department of Defense (DOD) with possible producers of essential military items in order to assure the capability for production during periods of national emergency. A Planned Emergency Producer is an industrial firm which has indicated its willingness to produce specified military items in a national emergency by completing an individual Preparedness Program Production Planning Schedule (DD Form 1519). See DOD FAR Supplement, § 8.070, DOD Instruction No. 4005.3, Industrial Preparedness Planning (Apr. 18, 1985).

prior to the issuance of the earlier RFP. In this regard, the protester argues that offers received from large businesses under solicitations that are subsequently canceled should not be viewed as expressions of interest for purposes of FAR § 19.502-5. According to the protester, this will encourage agencies to "shop" procurements by issuing an unrestricted solicitation (presumably without justification), thereby inviting large businesses to offer, and then cancelling the solicitation and reissuing it on an unrestricted basis, citing as justification the offers received from large businesses under the prior canceled solicitation.

We do not agree with the protester that the agency was precluded from considering the submission of International Hat's offer under the canceled solicitation as evidence of that firm's desire to supply the item. First, although both solicitations were for the same item, they constituted separate acquisitions, each of which was unrestricted for a different reason. We fail to understand why a response to the first solicitation by International Hat would not logically be viewed as evidence that International Hat would be interested in responding to a subsequent solicitation for the same items.

Further, we see no reason to anticipate that agencies will engage in what the protester describes as procurement "shopping," given that the submission of an offer is not the only means by which a large business manufacturer can express its interest in supplying a particular planned item. The Defense Procurement Supply Center's Contracting Policy Manual, cited to us by both the protester and the agency, indicates, for example, that an affirmative response by an inactive large business firm to a presolicitation notice will be viewed as a sufficiently affirmative expression of interest. We think that the agency reasonably viewed International Hat's submission of an offer under RFP 0761 as conveying a desire to participate in acquisition for the caps, and we therefore think that the agency correctly determined, in accordance with FAR § 19.502-5, that a total small business set-aside was inappropriate.

We, however, find the agency's position with regard to the feasibility of a partial set-aside unconvincing. FAR § 19.502-3 states that a portion of an acquisition shall be set aside for exclusive small business participation when:

"(1) A total set-aside is not appropriate . . . ;

(2) The requirement is severable into two or more economic production runs or

reasonable lots; [and]

(3) One or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion of the requirement at a reasonable price. . . ."

DPSC argues that the requirement was not severable into two or more economic production lots. The agency reports that its Clothing and Textile Production Branch determined that the production level at which the caps could be manufactured most economically, i.e. the Economic Production Quantity (EPQ), was 600,000 units. The agency explains that it attempts to procure items in quantities at or above the EPQ to avoid situations in which production becomes inefficient and unprofitable for the contractors, thereby resulting in unreasonable prices for the government. DPSC argues that at the time of award it will be committing itself to purchase only the initial order quantity of 950,000 caps, a quantity which cannot be severed into two or more lots without dipping beneath the EPQ of 600,000 units.

We recognize that the determination as to whether a particular acquisition should be totally or partially set aside for small business is left to the discretion of the contracting officer. APAC-Tennessee, Inc., B-229710, et al., Feb. 8, 1988, 88-2 CPD ¶ 124; All American Engineering Co., B-197977, June 23, 1980, 80-1 CPD ¶ 440. That determination, nevertheless, must be one which can be reasonably supported. Id. Here, we simply fail to see the logic in the agency's rationale. The solicitation is set up so that the initial quantity of 950,000 may be divided among three awardees (provided three reasonably priced acceptable offers are received); thus, in accordance with the RFP terms, the requirement may be severed into lots of 316,666 or 475,000, each of which is less than the agency's 600,000 EPQ figure. Since the RFP provides that the requirement may be severed into lots of less than 600,000 for award purposes, we do not understand why the 600,000 figure is a bar to the partial set-aside of this acquisition.

The contracting officer also argues that a partial set-aside will likely result in a portion of the procurement being noncompetitive. It is unclear whether the contracting officer means by this that the set-aside portion or the non-set-aside portion will be noncompetitive. To the extent that she means the latter, we point out that under a partial set-aside, both large and small businesses are first considered for award of the non-set-aside portion; therefore, even if International Hat is the only large

business offeror, there may be competition for the non-set-aside portion. To the extent that she means the former, the regulations pertaining to partial set-asides require only that one small business be expected to offer an acceptable product at a reasonable price. FAR § 19.502-3(3). Thus, although it is conceivable that there would be a single small business offeror under the set-aside portion of the procurement, this is permitted by the regulations. Moreover, there has been no suggestion by the agency that there is not a reasonable expectation of receiving offers from at least two responsible small business sources. We understand that it is the multiple award nature of this solicitation that is behind DPSC's reluctance to conduct this acquisition as a partial set-aside. There is, however, no exception in the regulations pertaining to partial set-asides which excludes multiple award solicitations. Thus, the agency is required to conduct the acquisition as a partial set-aside unless it can reasonably determine that one of the five exceptions listed in FAR § 19.502-3 applies. Here, the agency has not done so. Therefore, we sustain the protest on this basis and recommend that the agency reexamine the requirement and either produce a rationally supportable determination under FAR § 19.502-3 as to why the acquisition should not be partially set aside or cancel the current solicitation and resolicit the requirement as a partial set-aside. In addition, since we sustain the protest on this ground, we find that Atlas is entitled to recover the costs of filing and pursuing the protest, including attorney's fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988).

The protest is sustained.

*for Milton F. Jordan*  
Comptroller General  
of the United States